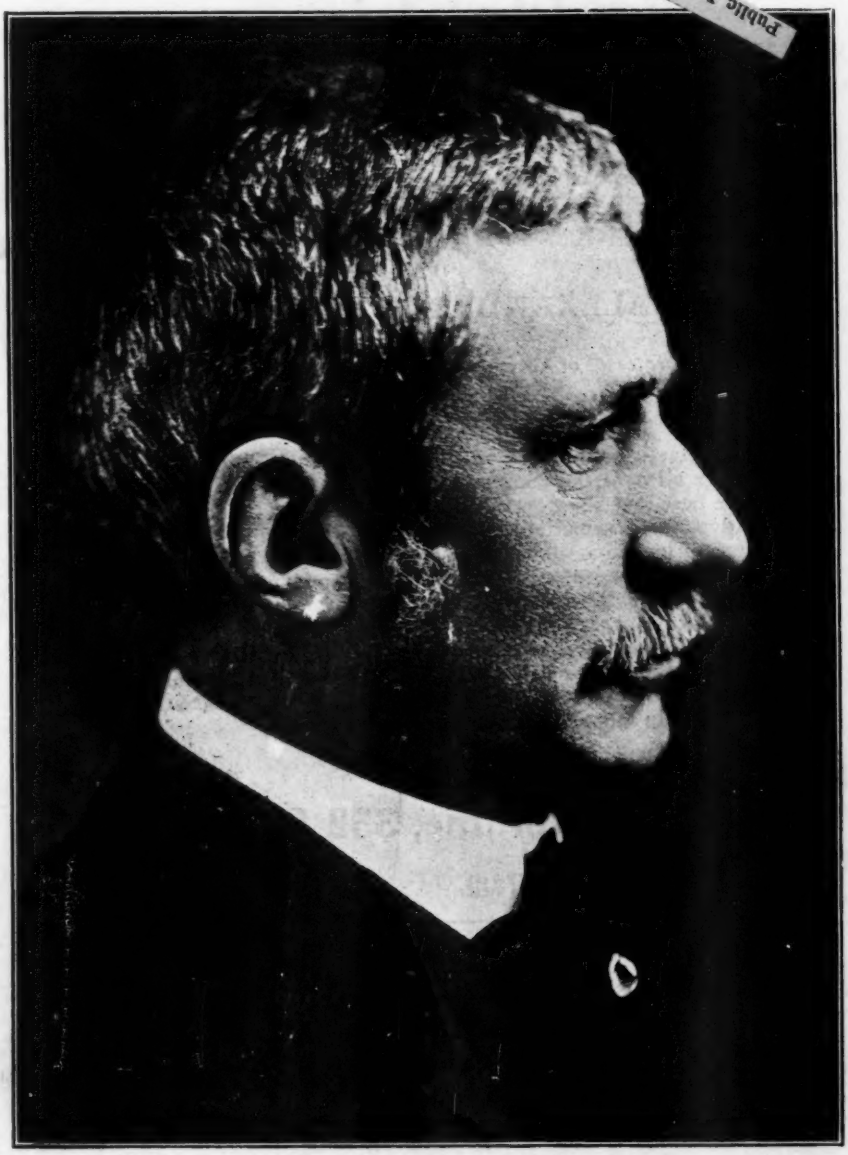
Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 82 ST. LOUIS, MO., JANUARY 1916. No. 1



ELIHU ROOT
of New York
President of the American Bar Association

Central Law Journal.

ST. LOUIS, MO., JANUARY 7, 1916.

LORD READING CALLED TO TASK FOR HIS AMERICAN INTERVIEW ON "JUSTICE."

A judge who stoops to flatter public misconceptions of the judicial administration of the law deserves the rebuke contained in the sharp comments which the English law journals have made with reference to some after-dinner remarks of Lord Reading while on his recent visit to this country.

Lord Reading is quoted as saying that "the idea that it is the duty of the law courts to dispense law, is becoming obsolete. It is recognized that the true duty of the courts is to dispense justice."

Law Notes (London) in its December, 1915, number, says:

"If his Lordship is correctly reported, then the observation of the average blunt old lawyer will be short and simple. 'Rot!' The tongue of the most careful man runs away with him in an after-banquet speech, and if his Lordship did make any such remark he now bitterly repents it. What a nonsensical idea laymen have on this point. 'Well, sir, it may be law, but it ain't justice.' In our experience, we have noticed the remark is generally made by a litigant who has just lost his case. The law of the land is made up of common law and statute law. If this law does not produce what the community regard as justice, then let Parliament amend the law. But in the name of common sense, don't let justice depend on the length and breadth of each judge's foot, or rather, brain."

Law and justice are not interchangeable terms. The one is objective; the other subjective. Law, in the practical use of that term, is society's conception of justice, concretely expressed in statute and decision. Abstract justice is an ever advancing but never completely attainable ideal toward which society keeps steadily striving. This ideal is realized in some measure from time to time by legislation changing or modifying rules of law. It must be borne in mind, however, that the popular assembly of the people is alone authorized to make the changes which the people regard as necessary to bring practical legal rules and abstract principles of justice into closer working relationship, and a judge is justified neither in lagging behind nor in going ahead of the community's conception of justice as expressed in the action of the legislature. A. H. R.

FALSE PERSONATION IN CLAIMING TO BE A FEDERAL OFFICER OF A NON-EXISTING OFFICE.

The U. S. Supreme Court reverses ruling by District Court reported in 221 Fed. 140, that false personation of an officer or employe of the United States under the Federal Statute, "must be personation of some particular person or class of persons, since there cannot be a false personation of a suppositious individual who never existed or whose class never existed." United States v. Barrow, 36 Sup. Ct. 19.

The Supreme Court holds to a broader meaning of the federal statute, saying that: "'To 'falsely assume or pretend to be an officer or employe acting under the authority of the United States' * * * is the thing prohibited. One who falsely assumes to pretend to hold office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part, but contains a modicum of truth the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or employment to which the accused pretends title has no legal or actual existence?"

The pretense in this case was that defendant falsely pretended to be an employe

of the United States to sell the "Messages and Papers of Presidents," and it was claimed that as there was no such federal employment, the United States had no concern in the pretense, but this was an offense, if any, under state law alone, and state authority could not be encroached upon.

Mr. Justice Whitney, speaking for a unanimous court, except McReynolds, J., not sitting, quoted from a cited case by defendant in error, as follows: "An act committed within a state, whether for a good or a bad purpose, or whether with an honest or criminal intent, cannot be made an offense against the United States unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States."

It is then said: "Accepting this criterion the legislation now under consideration is well within the authority of Congress. In order that the vast and complicated operations of the government of the United States shall be carried on successfully, and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employes be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect due to an officer of the government. * * * It is surely the same, and the power of Congress to prevent it is quite the same, whether the pretender names a non-existing office or officer."

Verily do we find the United States, though with limited and delegated powers and those incidental thereto for the protection of such powers, a touchy institution. And when those incidental powers take on the enforcing of "a spirit of respect and good will for the government and its officers" by criminal enactments, this seems the announcement of an era more in conformity to notions in monarchical, than in republican rule.

The genius of our government lies particularly in the principle that all of our citizens, whether some of them are servants in official capacity during a brief period or during good behavior, are all equal and all obedient and respectful and with good will for law and order. No other obedience, respect or good will is required or necessary or considered more than surplusage where this is had. It follows, as the night follows the day, that, if all of these are given to the law, its ministers will not be obstructed, and when there is speech of extra respect and good will to such ministers, it is misspeech only or an anomaly.

But is it not hard, indeed, to see how there is any lack of respect and good will for the federal government, in its delegated functions, for one to pretend to personate a federal officer under an authority that has no existence in federal law? It might deceive one ignorant of federal law, but it would be proof conclusive of fraud—simple fraud, only—to one informed. When the ignorant one shall become informed, he would say, "I will prosecute the cheat for the fraud," and he would go to the jurisdiction which enforces a penalty for such a deception. Can this jurisdiction be taken away by the offender telling a lie? This would be the case were objection made before a state court.

It avails little to criticise a ruling, even though it be not unanimous, of our Federal Supreme Court, but the reasoning adduced in its support seems to us to smack too much of countries whose officials in civil life strut with the importance which military discipline tolerates, not to say encourages. We trust this is not the forerunner of what shall obtain in the times of greater preparedness which seem to be coming. This decision does not greatly help to keeping well-defined the boundaries between

federal and state power, where regulation ends for the special purpose of our governmental agency enforcing the duties devolved on it and where the state power to punish crime as crime exists without interference.

NOTES OF IMPORTANT DECISIONS.

FOREIGN CORPORATIONS — CARRYING ON BUSINESS WITHOUT LICENSE.—The Federal Supreme Court reverses Kentucky Court of Appeals in a holding by the latter court, that a foreign insurance company continued to do business in Kentucky where as to policies in force in that state it received payment of premiums necessary to be paid to keep the policies alive. Provident S. L. Assur. Co. v. Kentucky, 36 Sup. Ct. 34.

The Supreme Court said: "It (the company) had sought to withdraw itself completely from the state. The conclusion that it continued to do business within the state, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that state, and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state. * * * Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control."

It is stated that were the company to maintain an office in the state to collect premiums on old policies, or in renewal of them, this would subject the company to the privilege tax spoken of.

All of this proceeds upon the idea, that a regulation aimed at the foreign company would not impair the obligation of the contract between the company and its stockholders, so far at least as the latter were concerned, and if state construction of the statute had this necessary result this construction would be rejected. And we think that, if the reasonably necessary way of preserving stockholders' rights required an office in the state for a limited purpose, this also should be granted. But it was unnecessary for the Supreme Court to go to this extent.

MONOPOLY—VIOLATION OF NOTICE AS TO RESALE OF MANUFACTURED ARTICLE.—We called attention in 81 Cent. L. J. 127, to an apparent conflict in U. S. v. Kellogg Toasted Corn Flakes Co., 222 Fed. 725, and Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 224 Fed. 566, as to whether a manufacturer could, without violating the anti-trust act, fix resale price, at retail, of a manufactured product.

The first of these cases held that this could not be done, while the second held it could. Now, the ruling in the second case has been affirmed on appeal to Second Circuit Court of Appeals. Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46.

The difference in decision between these two cases seems not to lie at all in the fact, that the United States was prosecuting and plaintiff was seeking to establish his right to purchase from a manufacturer unwilling to sell.

Lacombe, C. J., in speaking for a unanimous court in the affirming opinion, speaks of the business as follows: "The business of defendant is not a monopoly, or even a quasi-monopoly. Really, it is selling purified wheat middlings, and its whole business covers only about 1 per cent of that product. It makes its own selections of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones and Robinson to make their selections out of the other 99 per cent of purified middlings and put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may persuade the public that they are." The opinion goes on in this way and concludes by saying: "We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

This opinion is about as inconclusive as that which it affirms. Its language in some view is broad enough to include an article of necessity and it hedges by a recital that this article is not such. When merely by reason of the fact a manufacturer has not yet captured the mar-

ket as to a preference selection of an article of necessity, as to make him formidable, his means aiming at that end may not be arrested, though when he becomes formidable the course he has pursued may be condemned as no longer to be used. By the same token, a decree ought not to stop him entirely, but merely reduce his sales below the danger point.

SELF-DEFENSE—ONE CO-OWNER OF ILLICIT BUSINESS ATTACKING ANOTHER THEREIN.—In 80 Cent. L. J. 440, and in 81 ibid. 291, there was considered the "castle" principle under different aspects, the former where the attack was upon an owner of a home by a guest lawfully therein and not by an intruder, and the latter where the attack was by an intruder and the killing was not in the house, but in the yard outside. The former case was People v. Tomlins, 213 N. Y. 240, and the latter was Thomas v. State (Ala. Court of Appeals), 69 So. 315.

In Hill v. State, 69 So. 941, decided by Alabama Supreme Court, the question recurs, as to the application of the "castle' principle where a homicide was of deceased in an illicit distillery set up and maintained by the slayer and the deceased. It was held that: "If the person engaged in an unlawful business would not be protected in his illegal credit sales, it will not be held that if, while operating or conducting this unlawful business, he is attacked (this illegal business place not being his dwelling house), he has the same right to stand and defend that he would have in his dwelling house or house used in the conduct of a lawful business. The unlawful business house or place, and its keeper or maintainer are for the time not protected by the special right of defense of the castle. * * * Such unlawful occupant has no higher or more special right of defense than that extended to him in a public thoroughfare or in his wood or field."

We think this is sound doctrine, but unnecessary to be announced in a case where the homicide was not of an intruder but of one having equal right, or as good right, in the place, whether that of a lawful or unlawful business, as that of the slayer, a distinction pointed out by us in 80 Cent. L. J. 44, supra.

We say the principle announced as to occupant in a place where unlawful business is carried on affording no right of "castle" is sound, but this position is not free from doubt and may have its limitations. It is not a situation any individual has the right to challenge. It is a situation for the state by direct proceeding to assail and the occupant would have opportunity to defend his occupation as lawful. Suppose a business is lawful but is carried on without proper license?

ATTORNEY AND CLIENT—COMPROMISE OF JUDGMENT BY CLIENT IN WHICH ATTORNEY HAS INTEREST. By Kentucky statutes attorney at law is given a lien for his contingent fee in claims in suit according to agreement, which lien passes over to be a lien on judgment recovered in the suit. In a case decided by Kentucky Court of Appeals there was a suit and a judgment against a solvent defendant, which was compromised by the client, and the question was, what should be attorney's recovery against defendant? Chreste v. Louisville Ry. Co., 180 S. W. 49.

The Court said: "This is not a case where settlement was made with a client prior to judgment; nor is it a case where the judgment debtor is insolvent. It is a case where there was a judgment for $1,000, and a solvent judgment debtor settled with the plaintiff for $300. In such a case the amount of the judgment, and not the amount of the compromise controls; in other words, if the judgment debtor settles with the judgment creditor, in the absence of the creditor's attorney, for less than the amount of the judgment, he does so at his peril and cannot thereby deprive the attorney of any portion of the fee to which he is entitled under and by virtue of his contract of employment. As Chreste's contract between him and Drake called for a fee equal to 50 per cent of the amount of recovery, and as Drake recovered a judgment for $1,000, it follows that Chreste is entitled to recover of the railroad company one half of the amount of the judgment, or the sum of $500."

The record in this case shows that after the verdict was obtained for $1,000 and motion for new trial overruled, the railroad company agreed to pay a third person $175 if he would procure a settlement with plaintiff for $300. This third party agreed to give plaintiff $125 of his $175 if he would settle, which netted to plaintiff $425, the railroad agreeing to pay the attorney fee. The consideration moving to plaintiff very probably was the avoidance of an appeal by defendant. By the arrangement it paid out $475 and now has to pay the attorney $500. Its sharp practice did not gain for it anything, as, no doubt, court costs ate up the margin of $25.

The decision seems to indicate that when a judgment has been obtained, proceedings by appeal do not open matters so that a settlement may be made by defendant with the

client, though a compromise would limit attorney's recovery, if made at any time before judgment, whether with his consent or without it.

RECENT DECISIONS OF THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 94.

Is it the opinion of the Committee that there is professional impropriety in the following conduct of an attorney for a Bankrupt, viz:

The Bankrupt has filed an offer of composition on the basis of 20 per cent. His attorney sends out a circular letter to all of the creditors of the Bankrupt urging them to accept the offer and enclosing to them blank proofs of claim to be made out by the creditors, stating to them that he will file the proofs for them with the Referee in Bankruptcy and collect and remit their dividends free of charge, in case they see fit to return their respective proofs of claim to him.

Answer No. 94.—Although the question does not disclose how the attorney will collect the dividend, it would seem that his intention is to suggest the giving of a proxy or power of attorney. By the acceptance of such proxy in the usual form, the attorney would at once be authorized to act for both debtor and creditor—charged with conflicting duties. Unless his circular letter makes it entirely clear that the attorney, in offering to file proofs of claim, does not seek to assume the relation or duties of an attorney to the creditors, the Committee disapproves the practice suggested. Of course, no such communication should be sent direct to creditors who are represented by counsel.

QUESTION No. 95.

Pleadings—The lawyer's duty in respect to statement of facts and presentation of law.

Relation to Client—The lawyer's duty in respect to statement of facts and presentation of law, in pleadings.

Relation to Court—The lawyer's duty in respect to statement of facts and presentation of law, in pleadings.

Under Section 30 of the Code of Ethics of the American Bar Association, as published by West Publishing Co. in 1915, it is suggested that it is a lawyer's right to insist upon the judgment of the Court as to the legal merits of his client's claim, unless the suit is brought to harass or injure, etc.

Under New York practice practically all pleadings are verified. In order to get the legal merits of his claim before the Court the client must set forth his cause of action in legal terms with legal characterization of the facts, and swear to it. Of course the actual facts are clearly either true or false.

But do you consider that such a verification is equivalent to an *affidavit of merit* and that therefore there is a question of legal ethics involved, so that an attorney should not draw up a pleading for his client unless he, as a lawyer, believes beyond a doubt that his client has the law on his side? Or is it sufficient for the attorney to feel that his client has a claim or defense which is justiciable, as suggested by Section 30 above referred to, regardless of the attorney's own view of the legal merits? There is room for argument in most cases, as shown by the frequency of dissenting opinions of Courts.

Answer No. 95.—In the opinion of the Committee, if the facts be truthfully pleaded, the lawyer may present any fairly debatable law question for the Court's determination. The client is entitled to have a fairly debatable question of law presented from the angle of his side, though the lawyer might think, and might advise his client, that the question was a doubtful one. This, of course, excludes the raising of such points as the lawyer knows are without merit. At all times the lawyer must truthfully plead the facts as they are known to him; and if he pleads such facts according to their legal effect, he must believe that they fairly warrant the statements he makes in the pleading. For this he is responsible to the Court of which he is an officer.

QUESTION No. 96.

Advertising Solicitation.—Card of announcement that lawyer is a certified public accountant—not disapproved.

Card of announcement by lawyer that he is a certified public accountant, containing argumentative statements of his usefulness—disapproved.

In the opinion of the Committee would there be professional impropriety in a member of of the bar addressing a circular letter or printed announcement card to members of the bar advising them that he is both a member of the bar and a certified public accountant, and offering his services to them in matters of legal accounting, such as the preparation and trial of cases requiring a knowledge of accounting practice, enumerating by way of suggestion to them various classes of cases arising in their practice in which he considers that he may assist them with advantage because of his knowledge of the theory and practice of accounts?

Answer No. 96.—In the opinion of the Committee there would be no professional impropriety in a member of the Bar addressing a printed announcement card to members of the Bar, advising them that he is both a member of the Bar and a Certified Public Accountant; but the addition of the other matters stated in the question seems to the Committee to be objectionable.

REACTIONARY INTERPRETATION OF THE CODE.

Whether the Reformed Procedure or "Code" is successful in a given state depends largely upon the interpretation given by its courts to its simplest and most comprehensive provision, which in the words of the New York Code is as follows:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." New York Code, S. 3339.

Many of our courts at first hesitated, in fact refused, to recognize in this provision anything but meaningless babble. But the lamentable thing is, that a few courts still persist in nullifying in a large measure this basic provision of the "Code."

This provision, in fact the whole system of Reformed Procedure, sought to eradicate two egregious defects of the common law system of pleading, viz: (1) distinction between actions at law and suits in equity, and (2) the many distinct and arbitrary forms of actions of law. And back of these defects the framers of the "Code" recognized that the method of administering the law (the adjective law) had become petrified in the early history of the common law, whereas the law to be administered (the substantive law) was constantly adapting itself to the varying needs of a progressive civilization. It was for the purpose of breaking down this "inveterate incongruity" between the adjective law and the substantive law that the "Code" made its appearance in our jurisprudence. Relief had been sought through the establishment of courts of equity and the use of legal fictions; but, at last, the defects of the old system became so pronounced and obstructive of justice that the entire system was subjected to a revolution resulting in the new system commonly called the "Code."

What is the meaning of this provision of the "Code"? It must mean exactly what it says: first, that the distinction between *actions* at law and *suits* in equity are abolished, and second, that there shall be but one form of action denominated a civil action.

The legislature by this provision did not attempt to disturb the primary rights, duties and liabilities of persons either at law or in equity, nor did it undertake to abolish all distinction between "law" and "equity" as the two departments of our municipal law. In other words, a wrong violating a primary right gives rise to a secondary right either legal or equitable and entitles the party wronged to either a legal or an equitable remedy just the same as it did before the adoption of the "Code." But what the legislature did undertake to abolish was the distinction between legal *actions* and equitable *suits*. The remedies awarded by the courts are not effected because the remedy is no part of the *action* or *suit* but is the result of such action or suit. So, also, the legislature did not attempt to abolish the different legal remedies, but did undertake to abolish all forms of actions by which those remedies were attained. The remedies, however, were not effected but remained in the new system as in the old. Pomery Code Remedies, Chap. 1.

It was merely the machinery by which the remedy was reached that the legislature sought to change. Under the old system it was frequently the case that a suitor was disappointed because he brought an action at law and proved at the trial that he was

entitled to an equitable remedy, or that he proceeded in equity when he was entitled to a legal remedy, or that he misconceived the nature or form of his action at law, e. g. brought an action in *assumpsit* when he should have brought it in *case*. It was the purpose of the legislature to avoid such disappointments and permit a party to state the facts upon which he bases his primary rights and the acts or omissions violating these rights, and require the court to award the proper remedy. The legislature sought to change and did change to a great degree the forms, mode of procedure, parties, pleadings, and other steps of the action, but not the remedies to which the parties were entitled under the substantive law.

There is under the "Code" but one form of action whatever the remedy sought might be, whether legal or equitable, whether *ex contractu* or *ex delicto*. This form of action consists of a statement of the primary rights of the parties and the manner in which these primary rights have been violated. It is not the duty of the pleader to indicate the form of the pleading, obviously because there is but one form. It is merely his duty to present to the court the *facts*. It then becomes the duty of the court to determine what remedial rights flow from these facts and to award the consequent remedy.

I have tried to ascribe the logical and sensible meaning to this provision of the "Code." The great bulk of the more modern decisions have given this provision as liberal an interpretation as its language warrants; but there are a few courts that refuse to break the shackles that have bound us to the traditions of the old system, and therefore have refused to interpret the provision in accordance with its plain meaning.

Some courts in effect maintain that the division of actions into legal and equitable, and the distinctive features of actions at law, are inherent and cannot be abolished, and that, therefore, the legislature meant only to abolish the names of pleadings and not the forms. Thus we find the Supreme Court of Missouri using the following language:

"While the use of formal and technical averments, which were necessary at common law to the statement of a cause of action, have been dispensed with by our code and are no longer necessary, the same material allegations are necessary under it that were necessary at common law; and it is clear, we think, that at common law, in order to state a cause of action in trover, the petition should state that the plaintiff had possession, or the right to the possession, of the property sued for at the time of the conversion."[1] The courts that take this position do not seem to grasp the distinction between *actions* and *remedies*. The legislature did not attempt to abolish the *remedies* then existing but merely the *actions*, the machinery if you please whereby the litigant is given his remedy. The *actions* were not inherent and were subject to abolition.

If a plaintiff has stated his case on the theory that he is entitled to equitable relief when as a matter of fact he is entitled to legal relief, he should not suffer by reason of the fact that he has not anticipated the remedy to which he is entitled. To so hold would be to maintain all the distinction between legal actions and equitable suits known at the common law except the mere necessity of attaching a name. Yet there are courts that hold that under the circumstances just given the plaintiff must fail.[2] Here again the court fails to recognize that all *actions*, not remedies, are abolished by the "Code."

The courts of Indiana have imposed upon this provision a peculiar interpretation. The courts of that state require that a pleading must proceed upon some definite "theory," and that the complaint must be good upon the theory upon which it is pleaded, and if not, it is held bad, although the facts pleaded

(1) Citizens' Bank v. Tiger Nail Co., 152 Mo. 145, 53 S. W. 902; see also, Casey v. Mason, 8 Okla. 665, 29 Pac. 252; Parsley v. Nicholson, 65 N. C. 210.

(2) Shaw v. Howes, 126 Ind. 474, 26 N. E. 483.

constitute a cause of action.[3] The effect of this action is to maintain all the forms of actions at law and suits in equity, and merely refrain from ascribing to them the ancient nomenclature of the common law. Such a doctrine becomes proposterous when we reflect that the "Code" provides that a complaint is demurrable when "it does not state facts sufficient to constitute a cause of action," and that there is no provision that it is demurrable when it does not proceed upon a definite "theory." If facts sufficient to constitute a cause of action are stated in the complaint, it is difficult to understand why a demurrer thereto for want of sufficient facts should be sustained, merely because the "theory" is not definite or is ambiguous. The absurdity of sustaining a demurrer for want of a definite or unambiguous theory has been noticed by the courts of that state.[4] And if such a complaint should be held good as against a demurrer, why should a plaintiff fail who has proved the facts alleged therein but has been mistaken merely in the "theory" upon which he is entitled to relief?

The doctrine of "theory" has led to many interesting and strange results. In a recent decision the court concluded that although a complaint stated a good cause of action to quiet title, yet since the trial court had adopted a theory making the title to the land an incident merely, the plaintiff was not entitled to the remedy quieting title to his land.[5] In another recent decision, where a complaint did not proceed upon a definite theory, and the court's instruction permitted recovery on the theory of either the plaintiff or defendant, the judgment was reversed.[6] And further, it has been held, that this "theory" must be determined from the general tenor and character of the pleading and not by the prayer for relief,[7] while an earlier decision holds that the Appellate Court may determine the theory by examinin gthe entire record of the proceedings in the trial court.[8]

The true principle was very aptly and correctly stated by a well known Indiana writer: "The purpose of the enactment of the Code was that a party should be awarded by the court whatever relief or remedy the facts alleged in his complaint showed him to be entitled without regard to any *theory* of his or the court."[9] This doctrine which has been engrafted upon the code by judicial construction, is no doubt due to the judges' prejudice for the old system and is entirely reactionary.

LENN J. OARE.

South Bend, Indiana.

(3) Aetna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136; Cleveland, etc., Ry. Co. v. Dungan, 18 Ind. App. 435, 48 N. E. 238; Oolitic Stone Co. v. Ridge, 169 Ind. 639, 83 N. E. 246; State v. Scott, 171 Ind. 349, 86 N. E. 409.

(4) Scott v. Cleveland, etc., Ry. Co., 144 Ind. 125, 43 N. E. 133; Pittsburg, etc., Ry. Co. v. Rogers, 45 Ind. App. 230, 87 N. E. 28.

(5) Nesbit v. English, 107 N. E. 552.
107 N. E. 552.

(6) Lake Erie and Western Ry. Co. v. Barnett, 105 N. E. 931.

(7) Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N. E. 177.

(8) Carmel. et., Co. v. Small, 150 Ind. 427, 50 N. E. 476.

(9) Work's Pleading and Practice, s. 341.

CONTRACTS OF FRATERNAL INSURANCE COMPANIES AS COMING UNDER THE FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

Preliminary.—For seemingly the first time in the history of litigation in fraternal insurance, in a recent case decided by United States Supreme Court,[1] the question appears to have been squarely raised and presented of protection accorded to a charter and by-laws of a mutual benefit society by the faith and credit clause of the Constitution. This case held distinctly that a charter, or certificate of incorporation, granted under a general law of the State of Massachusetts, for a fraternal association under the lodge system, together with the constitution and by-laws thereunder, came under the faith and credit clause of the constitution, so far as such law

(1) Sup. Council R. A. v. Green, 237 U. S.—35 Sup. Ct. 724.

was construed by the highest court of such state, and the meaning and intent of contracts with the members of such organizations, so far as directed by such general law, must be as such highest court determines.

Respect for Construction at Home in Fraternal Insurance Cases.—Text books and encyclopaedias seem to have ignored the influence of the faith and credit clause in benefit society cases, and decision in its conflict, as between states, has passed on rights of members under their benefit certificates on independent questions of law, without any particular regard to the charter state of the company, whose contract was the subject matter of controversy.

I say particular regard, but I should add that a few cases have spoken of construction by the courts of the home state of the company as being entitled to great respect, but no case has pointedly declared that the foreign forum was bound to follow such construction, and at least one case has refused to follow it.[2]

In this case it appears that the fraternal company was organized under Missouri law and the opinion opens with the statement that: "The decision of this case involves interpretation and construction of the statutes of Missouri." The Court then proceeds in its own way to construe such statutes and says: "Appellant relies on the construction given to the act of 1897 by Missouri Court of Appeals in Supreme Council L. of H. v. Neidert, 81. Mo. App. 598." But because this Court's construction was viewed as "giving the act a retrospective operation," it rejected it. It is true Missouri Court of Appeals is not the highest court of that State, yet no point was made as to this, and it is admitted that the very statute involved was passed on.

An earlier Illinois case[3] was where the company was a Massachusetts organization and it was said: "We must respect the construction given to this statute by the Massachusetts courts," and Massachusetts cases are cited.[4] and some indicating other companies involved than the one before the court, thus conclusively establishing that it was the general law whose construction was before the court. It is not distinctly stated, however, that the Massachusetts construction controlled, and Grimme v. Grimme, *supra*, appears to show that it was not intended to so say.

A Connecticut case[5] refers to much authority to sustain its construction of Massachusetts law under which the company party was organized and adds that "this seems to be the construction placed upon it (the statute) by the Massachusetts courts." It so happened that the Connecticut court took the same view, but it did not intimate it felt bound by the view of the Massachusetts courts, though the cases cited were by the highest court of that state.

A later Connecticut case[6] speaks of a membership contract in a fraternal society, and in the course of discussion of its meaning reference is made to authority from various states and the Federal Supreme Court. It is observed that: "While the contract was a Connecticut contract, it was conditioned upon the laws of the society, and its laws, so far as valid, were in harmony with, and all of its contracts included the statute law of the state of its origin relating to fraternal benefit societies." Then are cited Massachusetts decision by its highest court, along with decisions from other states, but it is not intimated at all, that the former is given any precedence in value above the other, nor is any allusion made to state construction put upon its own statute, the company involved being a Massachusetts company.

(2) Grimme v. Grimme, 198 Ill. 265, 64 N. E. 1088.

(3) Palmer v. Welch, 132 Ill. 141, 23 N. E. 412.

(4) Am. Legion of Honor v. Perry, 140 Mass., 580; Elsey v. Odd Fellows M. R. Assn., 142 Mass. 224.

(5) Sup. Lodge N. E. O. P. v. Hine, 82 Conn., 315, 73 Atl. 791.

(6) Sup. Colony Order Pilgrim Fathers v. Toune, 87 Conn., 644, 89 Atl. 264.

In a Michigan case[7], the company involved was organized under Missouri statute. In the briefs authority is cited from many states, Missouri included. Campbell C. J. in his opinion cites no cases whatever, but he does say that the company "is in all its contract relations, subject to the conditions imposed by" Missouri laws. He speaks of "the intent of the prohibition" in these laws but he gathers that intent from his own reading of the Missouri statute and not as decided by its courts.

In a New Jersey case as decided in its Court of Chancery,[8] and afterwards in its Court of Errors and Appeals[9] a Massachusetts corporation was involved. The lower court said: "It is important to ascertain the force of the words 'other relatives' found in the (Massachusetts) act of 1882. To this end it is proper to inquire what force has been given to that language found in other statutes of Massachusetts by the courts of that state, and in that examination we find two remarkable cases." The Court of Errors and Appeals after citing Massachusetts cases said: "These decisions of that (Massachusetts) court on the powers of corporations established under the Massachusetts statute and on the mode of exercising those powers have almost, if not quite, absolute authority," citing for this a Maryland case.[10]

This Maryland case, in speaking of a Massachusetts statute, under which the company before the court was organized, said: "What the statute of Massachusetts authorizes to be done under it has been settled by the decisions of Massachusetts courts, and those decisions are controlling as to the effect and meaning of the statute, and we should follow them as making a part of the law of the state, no matter whether they are entirely in harmony with decisions of other states upon somewhat similar statutes or not." This statement does not expressly say, that the Maryland court was compelled to follow such decision even to the overruling of its own holdings in prior cases, or that all cases, though resting on similar statutes in different states, must be variously decided if ruling in the home states of companies were in conflict. There is, however, an implication to the latter effect in the ruling itself.

In a later case by Maryland Court of Appeals[11] there is an inference merely, that the statute should receive construction outside of a state as to all members belonging to the order that it receives at home, because equality of treatment is necessary. The only way it is practical to have this is to take the statute as it is construed where it is enacted. This it is perceived is merely persuasive reasoning to accomplish the end intended. It is not the announcement of a hard and fast rule. In a case in Massachusetts[12] the company was organized under Connecticut law, and the question was of change in beneficiary and of the proper interpretation of the words claimed to authorize the change. The court said: "The case of Knights of Columbus v. Rowe, 70 Conn. 545, is almost identical with this case, and it was there held, without any statement of the reason for this part of the decision, that the widow of the member was entitled to the benefit, instead of his father, who was designated as the beneficiary before the marriage. *This construction of a statute of Connecticut by the Supreme Court of that state is entitled to great consideration, if it is not absolutely conclusive upon us.*"[13]

Effect of Foregoing State Cases.—It may be that expressions such as above may be found in other cases, but as they occur in the reasoning of opinions they are somewhat difficult to run down in digests. That the principle they lead to is vitally important

(7) Sup. Lodge Knights of Honor v. Richardson, 60 Mich., 44, 26 N. W. 826.

(8) Tepper v. Sup. Council R. A., 59 N. J. Eq. 321, 45 Atl. 111.

(9) Same v. Same, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449.

(10) Am. Legion of Honor v. Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527.

(11) Sup. Council R. A. v. Brashears, 89 Md. 244, 43 Atl. 866, 73 Am. St. Rep. 244.

(12) Larkin v. Knights of Columbus, 188 Mass., 22, 73 N. E. 850.

(13) Italics are supplied.

in the very nature of such associations seems plain. Besides, if it be conceded, as the Towne case, supra, holds, that a member's contract, wherever it is made, is conditioned on the laws of the company so far as these are in correspondence to the laws of the state where it is organized, comity, if nothing else requires courts of other states to follow construction by the courts of the state enacting such laws. The federal courts admit the right of each state to construe its own statutes, and they claim independence of construction only in matters of general law. Shall one state concede less to a sister state than the federal judiciary concedes?

Expression by some of these courts appears to place them as being ready to say, if necessary, that, as a rule of interpretation, they are bound by a state's construction of its own statutes, independently of any bearing of the faith and credit clause on the matter. But rules of interpretation are subject to so many distinctions that they are not as safe guides as a rule of law, and this rule of law I think is found in the Green case, *supra.*

Faith and Credit Clause Protects State Construction of Its Laws.—Section 1 of Article IV of the constitution provides that: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and public acts are held to embrace statute law. But merely to construe the law of another state, while not questioning its validity, was held, with some exceptions, not to deny to it full faith and credit.[14] Nor do courts of another state deny full faith and credit to a law of another state, where it considered it and decisions of its courts as to what that law meant.[15] In another case[16] it was held, that a ruling turning upon the meaning of a decision of a state court construing its own statute is not necessarily denying to the statute full faith and credit, except that the construction of such decision be erroneous. In this case it was claimed, that a decision relied on by the court of the other state had been overruled, but it was held that this was not true.

But no more forcible illustration of the principle that it is state statute with state construction which the faith and credit clause protects can be given than the Green case first above referred to, as shown in and of itself and by the state case[17] which was reversed. In the latter case it was said: "The plaintiff's rights are not affected by the fact that the defendant is a corporation organized under the laws of Massachusetts, nor by the finding of the trial court that the statutory law, public acts of the commonwealth of Massachusetts, fraternal beneficiary organizations, of which the defendant supreme council is one, have power to change and amend their rate of assessment,, because (1) the trial court also found that the contract in all its essentials between the parties was entered into, made and completed in the state of New York, and (2) the statute of Massachusetts, under which the defendant claims the power to amend as to rates of assessment, was not enacted until 1902 and expressly provides that amendment, alteration or repeal shall not take away or impair any remedy which may exist by law."

The U. S. Supreme Court does not go into any consideration of the meaning of the original or amended Massachusetts statute, but takes as true and binding a Massachusetts case.[18] It said: "The (Massachusetts) court, after a careful review of the general nature of the corporation, of the character of the fund, of the rights of its members as evidenced by the certificates, of the constitution and by-laws of the corporation, and the laws of the state applicable thereto, decided that the increase complained of was valid,

(14) Allen v. Alleghany County, 196 U. S. 458, 464.

(15) Johnson v. N. Y. L. Ins. Co., 187 U. S. 491.

(16) Finney v. Guy, 189 U. S. 335.

(17) Greene v. Sup. Council R. A., 206 N. Y. 591, 100 N. E. 411.

(18) Reynolds v. Sup. Council R. A., 192, Mass., 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Am. Cas. 776.

impaired no contract right of the certificate holders and was entitled to be enforced."

Let us remember that the case thus referred to was not a case where any privity could be held to bind the plaintiff Green in the case before the court, and, therefore, the judgment, as a judgment, could claim no protection under the faith and credit clause. This principle was extended, as the chief justice shows, in another very recent case,[19] where a suit was brought by representatives suing for themselves and all other members in the mutual benefit department of an insurance company. The chief justice is thus explicit as to this: "Coming, then, to give full faith and credit to the Massachusetts charter of the corporation and the laws of that state to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the Reynolds case. *And this conclusion*[20] *does not require us to consider whether the judgment per se as between the parties was not conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. Into that subject, therefore, we need not enter.*"

It is to be noticed that the reversed case held, that it was deciding the rights of a member of the company under a New York contract, and, therefore, there was merely construction of Massachusetts law and of interpretation thereof by Massachusetts courts, even if it is admitted that the New York contract was conditioned on Massachusetts law. But the reversing court upheld the controlling effect of the law of Massachusetts as established by the ruling of its highest court. The New York court appeared to deny this effect in a New York contract conditioned on Massachusetts law. It did not admit it controlled, and then argue that the law as interpreted did not cover the case before the court. If it had done this its judgment probably would have come under the ruling of the Allen, Johnson and Finney cases *supra*. The faith and credit clause does not guard against mere reasoning by courts of other states, but there is presumption that they will respect, in good faith, its guaranties.

Faith and Credit Clause and Home State of Company.—The enforcement of the principle in the Green case cannot have the effect of eliminating conflict of decision in fraternal insurance company cases. Its only necessary effect is, that the members of a particular company, whether they reside at its home place of charter or in other states, and whether their contracts with it are where they reside or at the home place of charter, are all conditioned upon one law—that made and construed in the state which grants the charter. I will illustrate this by cases decided in the state of New York.

The Green case against the Royal Arcanum was decided erroneously, because it held that an increase in rates was in impairment of contract rights, when interpretation placed by Massachusetts courts on the law under which the defendant was organized held to the contrary. This same ruling by New York courts in another fraternal insurance case[21] was right, if Michigan, its home state, rules the same way. I leave that question to local inquiry.

Another case[22] holding the same way may be deemed correctly decided, because the defendant was a New York corporation and the ruling was on the principle of *stare decisis*. This case, like the Reynolds case, *supra*, could be taken as conclusive interpretation of New York law, upon which the

(19) Hartford L. Ins. Co. v. Ibs, 237 U. S.—, 35 Sup. Ct. 692.

(20) Italics Supplied.

(21) Wright v. Knights of Maccabees, 196 N. Y. 391. 89 N. E. 1078. 134 Am. St. Rep. 838.

(22) Dowdall v. Catholic M. B. A., 196 N. Y. 405, 89 N. E. 1075.

contracts of members are conditioned. The same may be said of another case.[23]

Another case[24] was of a Massachusetts company, and though it might be thought to involve the same principle as the Reynolds case, yet the precise question was not involved. This case showed attempted reduction of amount of insurance. The Reynolds case showed increase of assessment. There would be room here to argue that this question was not covered and there would be no denial of faith and credit in refusing to apply the Reynolds case.

Another case[25] in this volume concerned a Pennsylvania company. This case involved the question as to the operation, whether retrospective or not, of a suicide amendment. The opinion does not disclose any reference to Pennsylvania decision. This reasoning would seem under the Reynolds case to be wholly irrelevant, if there existed any Pennsylvania ruling on the point, by its highest court. I leave this to local investigation.

In a case concerning a New York corporation,[26] the decision was right on the same principle that governed the Dowdall case, but the court refers to rulings in support rendered in suits against domestic and foreign corporations, without making any distinction between them, as required by the principle declared in the Green case. It only needed to refer to cases where domestic corporations had been sued.

The illustration of the operation of the faith and credit clause, as shown by my reference to New York cases, can be multiplied for every state. I do not attempt to show which of the rulings are right or wrong, but that some of them are right and others wrong is clear, for I believe it to be true that the different states, with such rare exceptions as hereinbefore pointed out, have not considered as important the question of the home place of the corporation. Those that have regarded this fact as important have done so either on the theory that rulings at the home state were more persuasive than others and because that state must have intended there should be uniform operation everywhere. This intention, however, might be viewed, as many courts have viewed the intention in uniform legislation, to be applied with many reservations and exceptions. These have crept into decision so much as seriously to hinder the commendable purpose in uniform laws. The faith and credit clause, however, in a case, where the question is properly raised, secures a constitutional right that the courts must enforce.

For a learned note showing the conflict of authority on the question in the Reynolds case, see 7 L. R. A. (N. S.), beginning at 754, and 1 Ann. Cas. 715, which may be useful for reference in suits brought on benefit certificates in foreign companies. But, as above said, this involves inquiry into the law of home states, and the space allowed to this article cannot be extended to a showing of what is the law of every state that has authorized the incorporation of fraternal benefit societies.

N. C. COLLIER.

St. Louis, Mo.

(23) Parish v. New York Produce Exchange, 169 N. Y. 51. 61. N. E. 977. 56 L. R. A. 149.

(24) Langan v. Am. Legion of Honor, 174 N. Y. 266, 66 N. E. 932.

(25) Shipman v. Protected Home Circle, 174 N. Y. 398. 67 N. E. 83, 63 L. R. A. 347.

(26) Ayers v. Ancient Order United Workmen. 188 N. Y. 280. 80 N. E. 1020.

out of the ground.—Lesamis v. Greenburg, U.

ATTORNEY AND CLIENT—WHAT IS LAW BUSINESS?

GROCERS & MERCHANTS BUREAU OF NASHVILLE, Plaintiff in Error v. DR. W. E. GRAY, Defendant in Error.

In the Court of Civil Appeals at Nashville, Tennessee. Nov. 29, 1915.

Where a collection agency, organized as a corporation, contracts for a consideration "to give legal advice" to its customers, it is engaging in law business and the contract so made is contrary to public policy and is therefore void and unenforceable.

HALL, J. This action originated before a Justice of the Peace of Davidson County, and was brought by the Grocers & Merchants Bureau of Nashville against the defendant in error to collect the sum of $10.00, growing out of a certain written contract filed as exhibit "A" to the

agreed statement of facts entered into between the parties, and upon which the case was tried in the court below, and which is made a part of the record upon this appeal. Said written contract was entered into on June 25, 1914, between the plaintiff in error and the defendant in error, Dr. W. E. Gray, who is a colored physician residing in the City of Nashville, Tennessee.

The defendant in error defended the suit upon the ground that said contract was contrary to the public policy of the State, and was, therefore, illegal and void.

A trial of the case in the court below before the Hon. J. B. Daniel, special judge, without the intervention of a jury, resulted in a dismissal of plaintiff in error's suit, and it was taxed with the costs thereof. From this judgment it appealed to this Court, after its motion for a new trial had been overruled, and error have been duly assigned.

The plaintiff in error is a collection agency incorporated under chapter 58 of the Acts of 1901, providing for the organization of corporations for the purpose of conducting commercial, mercantile and protective agencies for the collection of debts. And for the purposes usual and appropriate to the business of such agencies.

The contract solicited by the plaintiff in error and entered into with the defendant in error on June 25, 1914, provided that in consideration of $10.00, to be paid monthly thereafter at the rate of eighty cents per month by the defendant in error, the plaintiff in error would furnish "the following improved and strictly up to date service: (1) Rating book; (2) Supplements; (3) Standing of newcomers; (4) Special reports in Nashville; (5) Special reports in Tennessee; (6) List of bankrupts; (7) Free notary work; (8) Free legal advice regarding commercial matters; (9) To keep office open every Saturday evening until six o'clock."

It appears from the agreed statement of facts that said $10.00 was never paid, and was due under the terms of said written contract at the time the present action was brought.

It was the insistence of the defendant below that plaintiff in error was engaged in the practice of law and contracted, among other things, to perform the services of an attorney and counsellor at law for the defendant; that such a contract is illegal in Tennessee, except when made by a duly licensed attorney; and that the contract being illegal in part and the consideration being entire, the whole contract was vitiated. It was further insisted that the contract was also void upon the ground that it was solicited by the plaintiff in error.

The agreed statement of facts shows that plaintiff in error employs a reputable and competent member of the Nashville bar to give to its clients the legal advice which it contracts to furnish its subscribers or patrons. And it is insisted by counsel for plaintiff in error that, in pursuing this course, it was not in any sense holding itself out as an attorney or counsellor at law, nor is it engaged in the practice of law, but only hires a lawyer to give its clients legal advice, which it is insisted, is in no way contrary to public policy. It is conceded by counsel for plaintiff in error that a corporation is not eligible to practice law in this state.

We think this is undoubtedly true, as our statutes upon the subject only apply to natural persons who must be twenty-one years of age and of good moral character, and shall stand the examination prescribed by the State Board of Law Examiners, and shall have been duly licensed as required by chapter 247 of the Acts of 1903, and Shannon's Code, Sec. 5772.

The question presented upon the agreed statement of facts is whether the services undertaken to be performed by the plaintiff in error under the eighth item of said contract constitutes an undertaking to practice law within the meaning of our statutes, and with the legal significance of that term.

In the matter of the Co-operative Law Co., 198 N. Y. 479, 19 Am. & Eng. Ann. Cas., 879, a corporation was chartered to furnish to its subscribers legal advice and service; to operate in connection with the above department of law and collection for the use and benefit of the subscribers of the company only.

The Bar Association of the City of New York intervened to have its charter vacated, and the Court of Appeals, in vacating the charter, said:

'The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for that purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to his discipline, liable to

punishment for contempt in violating his duties as such, and to suspension or removal. It is not lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, so that would be an evasion which the law will not tolerate. Quando aliquid prohibetur ex direct, prohibetur et per obliquim. Co. Litt. 233.

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it invites the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the direction of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counsellor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

We have quoted from the opinion in the above case at length, because the case is directly in point, and the opinion set forth some most wholesome reasons why a corporation cannot practice law, either directly or indirectly, all of which this court heartily approves.

In People vs. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697, it was held under the New York Statute, (laws of 1907, ch. 344, Sec. 15), providing that "any person not a registered physician who advertise to practice medicine shall be guilty of a misdemeanor," that a corporation organized under an act authorizing incorporation for manufacturing, mining or chemical purposes might be convicted for advertising to practice medicine.

In State Electric Medical Institute vs. State, 74 Neb., 40, 12 Am. & Eng. Ann. Cas., 673, it was held, under a statute of the State of Nebraska requiring a license for the practice of medicine, that a corporation is not such a person as can obtain a statutory license to practice medicine in said state.

In Hannon vs. Siegel-Cooper Co., 167 N. Y., 244, 52 L. R. A., 429, it was held that a corporation could not engage in and advertise that it was practicing dentistry.

In re Duncan reported in 83 S. C., 186, 18 Am. & Eng. Cas., 657, it was held that any advice given to clients, or action taken for them, in matters connected with the law is practicing law. In that case the court said:

"It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other paper incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all actions taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law. The following is the concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country.'"

Under these definitions there can be no doubt that the giving of legal advice "regarding commercial matters" is engaging in the practice of law. This being true, we are of the opinion that the contract solicited and entered into by the plaintiff in error with the defendant in

error, Dr. Gray, is illegal and non-enforceable, because against public policy.

The eighth item of said contract obligated the plaintiff in error to give to the defendant in error legal advice regarding all commercial matters, which was a portion of the service for which the $10.00 were to be paid. The fact that plaintiff in error employs a licensed attorney to perform such services for it cannot make the contract legal, for the reason, that if it cannot practice directly, it cannot do so indirectly by employing a licensed attorney to carry on the business of practicing law for it.

It results that we find no error in the judgment of the court below, and it is affirmed with costs.

NOTE.—*What Constitutes the Practice of Law?*—So many legislatures and bar associations have become interested in driving out of the practice of the law, those not licensed therefor, that it becomes more than an interesting academic question to define the terms "law business" and the "practice of the law," in order to determine who are and who are not "legal practitioners."

There seems to be hardly any doubt that the *advocatus* of the old Roman system of jurisprudence referred only to those who appeared for their *clientes* before some juridical tribunal. And this is still the distinguishing characteristic of the work of the *advocat* in the practice of law in continental Europe and of the barrister in the British Empire. The jurisconsult under the old Roman law, on the other hand, was engaged in what we would now call office practice. He gave advice with respect to business and personal rights under the law to all who sought his chambers. The English solicitor has added to the usual prerogatives of the jurisconsult the duties of a conveyancer.

The American attorney and counselor at law draws to himself all of the distinguishing characteristics, prerogatives and privileges of every order of legal practitioner. He is an advocate, jurisconsult and conveyancer, all in one, and his license authorizes him in the exclusive performance of all duties which properly came within the purview of these great and heretofore separate professions.

I might be pardoned a moment of digression in which to remark that it is not altogether a matter of settled conviction in this country either among the people or the profession, that it would not be in the interest of greater efficiency in the administration of legal affairs to separate the practice of law again into some of the component parts into which it was originally divided. At least, it has seemed to some that the state might very properly license men as conveyancers who were not also entitled to appear in court as advocates. But until such a distinction is made by the legislature, it is certain that in this country a lawyer is not only licensed to practice law, but is the only person in the community who has any authority to perform legal business of any kind, including that of conveyancing.

Some states like Missouri distinguish the terms "practice of law" and "legal business" and while absolutely prohibiting any but licensed attorneys from practicing law, exclude unlicensed persons from doing legal business only where such business is performed for compensation. (Mo. Sess. Acts, 1915, p. 99. See 81 Cent. L. J. 4, where these interesting statutes are set out and discussed in full.) The distinction is important since it is one of the treasured inheritances of the practice of the law that, whatever it may be to-day, it was originally a purely honorable profession—its highest reward being the honor which attended the service which the *patronus causorum* was enabled to render in the cause of justice. The Cincian Law of ancient Rome prohibited advocates from receiving compensation for their services. Later this law was modified to the extent of permitting the client to reward his benefactor with an honorarium and this is still the practice of the English barrister, even though often concealed under thinly veiled subterfuges. No such restrictions, however, were ever imposed on the solicitor, conveyancer or legal advisor, so the distinction made by the recent Missouri statutes comports with the best traditions of the profession.

So far as the "practice of law" is concerned, which includes the appearance before a judicial tribunal on behalf of another, there can be no doubt that it would defeat the very purpose of the laws passed to elevate the moral character and intellectual capacity of those entitled to practice law to permit unlicensed practitioners to appear in court and plead in behalf of another. In some states, however, this restriction is limited to courts of record, and litigants in police and justice courts are permitted to be fleeced and defrauded by incompetent, unlicensed practitioners. It would seem advisable that if unlicensed practitioners may appear for clients before inferior tribunals, they should be prohibited from receiving compensation for such services which would be effective at least to the extent of limiting such service to the gratuitous undertakings of friends of the litigant or of social service workers who are interested solely in assisting in securing justice for those unable to procure counsel.

From what we have already said, it will be noted that the prerogatives and privilege exclusively reserved to licensed practitioners are quite unrestricted though possibly indefinite. The Supreme Court of the United States has recognized this very broad scope of an attorney's duties in this country when it defined them as follows:

"Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as used in this country." National Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621.

It must be borne in mind that the right to represent another unlike the right to appear and represent his own cause in a court of justice or to draw his own legal papers, is not a natural right protected by the Constitution. It is a privilege conferred by the state upon those show-

ing proper moral and intellectual qualifications. In re Durant, 80 Conn. 140; State Bar Commission v. Sullivan, 35 Okla. 745; In re Application for License to Practice Law, 67 W. Va. 213; Cohen v. Wright, 22 Cal. 307. And the supervision which courts by summary proceedings have over the exercise of this privilege is an important safeguard against oppression of clients and incompetency in the handling of judicial disputes which it is the policy of the law to preserve.

Therefore, even where an attorney at law properly admitted is afterward disbarred, he is not entitled to recover the compensation provided for in the contract to prosecute a claim before the Treasury Dept., of the U. S., nor could he continue to perform any services under the contract. Moyers v. Graham, 15 Lea. (Tenn.) 57. This case shows how jealous the courts are with respect to the exercise of privileges which depend on the prior and continued judicial recognition of qualifications which entitle one to the enjoyment of such privileges.

It is well settled, therefore, that all contracts by unlicensed persons for the performance of services which are regarded as legal business are against public policy and will not be enforced. Ames v. Gilman, 10 Met. (Mass.) 239; Bachman v. O'Reilly, 14 Colo. 433; Sellers v. Phillips, 37 Ill. App. 74.

In Colorado, Missouri, New York and possibly other states, it is a misdemeanor for one unlicensed to practice law, to contract to render legal services and it is held that any money paid for such services may be recovered three-fold. Such statutes have been construed and upheld in two cases. Hittson v. Browne, 3 Colo. 304; Buxton v. Lietz, 136 N. Y. S. 829.

Under many of these recent statutes the question of such established businesses as trust companies and collection agencies have come into question and it is interesting to note that the court in Buxton v. Lietz, *supra*, construing the New York statute held that a contract for services or commissions made with an individual engaged in the business of a mercantile agency for collection of accounts on behalf of clients and instituting suits for that purpose when necessary, is illegal and unenforceable.

So strict has been the enforcement of the Colorado statute respecting the unlawful practice of the law that one who had been licensed to practice law in another state who had removed to Colorado was convicted for practicing law without first having been admitted in Colorado. People v. Ellis, 44 Colo. 176.

What is the practice of law or the doing of law business, which is thus prohibited by these statutes has been broadly stated by a recent authority as follows:

"It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings in behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds and in general all advice to clients and all actions taken for them in matters connected with the law." Thornton on Attorneys at Law, Vol. 1, p. 105.

This comprehensive statement of duties prohibited in their performance in a representative capacity to those unlicensed to practice law and whose performance in such capacity constitutes a misdemeanor under recent statutes, seem to be fully sustained by the authorities. In re Co-operative Law Company, 198 N. Y. 479; In re Duncan, 83 S. C. 186.

In Ely v. Miller, 7 Ind. App. 529, it was said: "As the term is generally understood, the practice of law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal documents and contracts by which legal rights are secured, although such matter may not be depending in any court."

Nor is it necessary that one perform legal services in order to violate a statute prohibiting the practice of law by unlicensed persons. The mere printing of cards and letterheads and the inclusion of one's card in a newspaper or directory in which he holds himself out as an attorney at law is sufficient. People v. Erbaugh, 42 Colo. 480, 94 Pac. 349.

It seems that in North Carolina the element of compensation is necessary to make out a case of "practicing law" and in that state it was held that a person by appearing on behalf of a defendant, examining and cross-examining witnesses, and arguing the case, would not violate a penal statute forbidding him "to practice law as an attorney in any of the courts" if he did not claim or receive any compensation for his services, professed to act as "agent" and did not hold himself out to the public as an attorney at law. State v. Bryan, 98 N. C. 644. In other words, the court in effect, holds that practicing law, implies more than a single act; it implies conduct extending over some period of time by which a person holds himself out as an attorney and charges a compensation for his services. See also to same effect: McCargo v. State, 1 So. Rep. 161.

The following cases indicate what does not constitute the practice of law: performing the usual duties of a notary public (Allen v. Jarvis, 32 U. C. Q. B. 56, 64); assisting in procuring a pardon (Bird v. Breedlove, 24 Ga. 623); doing the work of a "process server" (In re Louis [1891] 1 Q. B. 649; a chartered accountant sending a dunning letter with threat of suit (Montreal Bar v. Duff, 24 Quebec Super. Ct. 478).

In the last case cited it was said: "What the legislature had in mind was to protect the legal profession against the acts of those who would attempt to pass themselves off as lawyers and through this deception exact fees which they had no right to demand. The practice of lawyers to write warning or conciliatory letters to the adverse party has been so common and so universal that it may be considered as part of the exercise of their profession, but I know of no law by which such practice might be restricted to members of the legal profession or which would constitute it a privileged right in their favor."

A. H. ROBBINS.

ITEMS OF PROFESSIONAL INTEREST.

ELIHU ROOT, PRESIDENT OF THE AMERICAN BAR ASSOCIATION

Very few public men who have been as long in politics as Elihu Root are as favorably regarded or so universally admired. As a judicial thinker and as a law practitioner, Mr. Root is unhesitatingly estimated by his contemporaries in the legal profession as the present-day leader of the American bar. His recent selection at Salt Lake City last August as president of the American Bar Association confers upon him, therefore, the honor of being the titular as well as the actual head of his profession.

Mr. Root was born February 15, 1845, at Clinton, New York. He was graduated from Hamilton College in 1864, received his degree of LL.B. from New York University in 1867 and was admitted the same year to practice at the bar in New York City. In 1883 he was appointed by President Arthur as United States Attorney for the Southern District of New York, serving for two years, when he once more embarked upon the active practice of the law, which was not again interrupted by the demands of political leaders until 1889, when he was appointed Secretary of War by President McKinley. President Roosevelt later appointed him Secretary of State, which position he held until 1909, when he was elected United States Senator from New York.

Mr. Root has given more time and attention than is usually contributed by busy lawyers to the solution of questions of public interest. He was a delegate to two Constitutional Conventions, and was chairman of one of them. He represented the United States as chief counsel in the North Atlantic Fisheries Arbitration at The Hague in 1910, and was a member of the Alaskan Boundary Tribunal in 1903.

He was elected in 1910 a member of the permanent Board of Arbitration at The Hague, and later was president of the Carnegie Foundation. For his activity in behalf of the peaceful solution of international questions he was awarded the Nobel Peace Prize for 1912.

But after all is said about this eventful life, it is as a great lawyer, a keen, far-seeing, philosophical, yet practical, student of jurisprudence that Mr. Root's profession and posterity will ever regard him. A. H. R.

JETSAM AND FLOTSAM.

ANECDOTES ABOUT HON. JERE S. BLACK.

Mrs. Mary Black Clayton, in her "Reminiscenses of Jeremiah Sullivan Black," relates some new anecdotes of the great jurist. Mrs. Clayton said:

"He was as different from the ordinary boy as noon is from midnight. The busy bee which 'gathers honey from every opening flower' was no more diligent than he was in acquiring knowledge. From the time he could talk well enough to ask questions to the day of his death, no human being who knew anything parted with him without having given him of his knowledge.

"When he was on the Supreme Bench of Pennsylvania a friend took him to see the Philadelphia markets. Next day the friend's butcher said:

"'Excuse me, sir; but was not that gentleman with you yesterday a butcher?'

"'No; he is Chief Justice of Pennsylvania.'

"'I was sure he was a butcher; he knew so much about the business.'"

In 1851 Judge Black was nominated for Judge of the Pennsylvania Supreme Court and was elected by a larger majority than any other man running on the ticket.

Four other judges were elected at the same time. They drew lots for length of terms, with the understanding that the justice drawing the fewest years was to be chief of the bench during the term. Judge Black wrote home thus:

"'My Own Mary: We drew yesterday, and the result is as follows: Black, 3 years; Lewis, 6 years; Gibson, 9 years; Lowrie, 12 years; Couter, 15 years. So you see your husband is to be chief justice. I don't like it. The whole business has been like our old woman's soap; somehow I have no luck with it.'"

He was the most modest of great men, and so remained until his death.

THE ATTORNEY'S SOLILOQUY.

(With Apologies to the Bard of Avon.)

To quote, or not to quote; 'tis often questioned
Whether 'tis better to embellish pleadings
With borrowed words of true euphonic merit,
Or speak plain truths in prosy words of wisdom,
And, speaking thus, prove tiresome.

To dull; to drug—with words,
And in this stupor, credulous,
Our clients may believe our word is law.

But why thus stupefy? Let us speak words
And thoughts of high intent; and let them be
The words first used by sages long since dead.
The fact that they've endured the test of time
But proves their worth; there's great support
In calling to our aid these marvelous thoughts.
Who could resist such pleas as Portia made,
The words of Cicero, or Henry Clay?
A judge, or jury, ev'n, could but agree
With arguments of law so reinforced.
Mere jurisprudence and the Civil Code
Are cold as glittering steel or lifeless clay;
A soulless thing; man needs the human touch;
That spark divine which renders all men kin;
The love which doth make brothers of us all.
This may result from rhetoric, not from law,
And ne'er is found in Blackstone's musty tomes.

So why not mollify what law dictates
With epigrams familiar to all men?
Enforce where need be, ridicule, retort,
Or strike the chords of sympathy, sincere?
And thus t' apply the wisdom of the world,
To bring about the verdict so desired,
Is but a trick of memory, and the tongue,
Pleasing and forceful; therefore, 'tis no wrong.

—M. A. W., in The Docket.

"PRIVILEGED COMMUNICATION — LIBELOUS COMPLAINT AS TO INTOXICATION OF EMPLOYE.

"We imagine that there can be no doubt as to the soundness of the decision of the California Court of Appeal, Third District, in Adams v. Cameron, 150 Pac., 1005, confirmed by the Supreme Court in 151 Pac., 286, that a complaint made by a passenger to a railway company as to the intoxication of a conductor and consequent discourtesy to another passenger, is not a privileged communication, and that damages are recoverable, if the complaint results in the discharge of the conductor. Yet there seems to be some disposition to uphold the contention of the defendant. In the Central Law Journal it is said:"—National Corporation Register.

Here follows excerpt from 81 Cent. L. J., 361. Had our contemporary looked more closely into the decision it cited, it would have discovered that the courts referred to held that the communication *was* privileged and the Supreme Court held that the error of the lower courts as to the way this privilege was treated was harmless.

EDITOR C. L. J.

HUMOR OF THE LAW.

The attorneys for the prosecution and defense had been allowed fifteen minutes each to argue the case. The attorney for the defense had commenced his argument with an allusion to the old swimming-hole of his boyhood days. He told in flowery oratory of the balmy air, the singing birds, the joy of youth, the delights of the cool water—

And in the midst of it he was interrupted by the drawling voice of the judge:

"Come out, Chauncey," he said, "and put on your clothes. Your fifteen minutes are up." —Everybodys.

A man was brought before a police court charged with abusing his team and using loud and profane language on the street. One of the witnesses was a pious old darky, who was submitted to a short cross-examination.

"Did the defendant use improper language while he was beating his horses?" asked the lawyer.

"Well, he talk mighty loud suh."

"Did he indulge in profanity?"

The witness seemed puzzled. The lawyer put the question in another form:

"What I mean, Uncle Aus, is—did he use words that would be proper for your minister to use in a sermon?"

"Oh, yes suh, yes suh," the old man replied, with a grin that revealed the full width of his immense mouth; "but dey'd have to be 'ranged diff'runt."—Everybodys.

The old negro had been arrested for "having more than one wife," the last woman being the complainant. He happened to be well known locally and an orderly character.

"How many wives have you had?" demanded the judge.

"Six, yo' Honor," was the reply.

"Why couldn't you get along with them?" the judge insisted.

"Well, suh—de fust two spiled de white folks' clothes when dey washed 'um; de thu'd worn't no cook; de fo'th was des nacherally lazy—en' de fif'—I'll tell yo', Jedge—de fif' she—."

"Incompatibility?" the court suggested.

"No, yo' Honor," said the old negro slowly, "it worn't nothin' lik dat. Yo' jes' couldn't get along wid her onless yo wuz somewhars else." —National Corporation Reporter.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assault and Battery**—A complaint charging an assault with "knucks, commonly known as brass knucks," and an information charging the assault with "knucks," do not show a fatal variance.—Chisom v. State, Tex. Cr. App., 179 S. W. 103.

2. **Attachment** — Abandonment. — Substitution in place of plaintiff of partnership of which he was a member held not an abandonment of attachment or release of the sureties so as to justify vacation of the attachment.—Noziska v. Aten, S. D., 154 N. W. 445.

3. **Attorney and Client**—Fees.—An agreement by one charged with murder to pay counsel $1,000 each does not show that the fee is excessive.—Hansel v. Norblad, , Ore., 151 Pac. 962.

4. **Bailment**—Bad Faith.—A bailee for the accomodation of the bailor is answerable only for his gross negligence or bad faith, the degree of care being measured, however, with reference to the nature of the article bailed. —Ridenour v. Woodward, Tenn., 179 S. W. 148.

5. **Bankruptcy** — Composition. — Under Bankr. Act, § 40, and bankrupt's stipulation, recorded in lieu of depositing cash for costs required by the act as a prerequisite to confirmation of a composition, referee's order fixing his own fees held proper.—In re J. B. White & Co., U. S. D. C., 225 Fed. 796.

6.——Equity.—Bankruptcy proceedings are equitable in nature, and bankruptcy courts administer the law according to the spirit of equity.—Ogden v. Gilt Edge Consol. Mines Co., U. S. C. C. A., 225 Fed. 723.

7.——Liens.—Where property of a bankrupt was sold in bulk, the lien of a creditor upon a specific part of the real estate did not follow the proceeds of the sale, where the amount derived from the particular real estate did not appear.—In re B. A. Lockwood Grain Co., U. S. D. C., 225 Fed. 873.

8.——Parties.—Where registered holder of bonds was adjudged a bankrupt, but trustee did not claim the bonds, right to enforce payment was in registered holder.—Shaffner v. Federal Cement Co., U. S. D. C., 225 Fed. 893.

9.——Special Fund.—Where a bankrupt stockbroker did not have in his possession free and clear stock for all customers, none of them could reclaim any part of the stock on hand or any equity in such loans as had among their collateral the remaining stock.—In re J. F. Pierson, Jr., & Co., U. S. D. C., 225 Fed. 889.

10.——Voluntary Assignment. — Bankruptcy Act recognizes right of bankrupt to make voluntary assignment of his property to avoid attachments thereon and secure an equal distribution among all creditors.—Bell v. Blessing, U. S. C. C. A., 225 Fed. 750.

11. **Banks and Banking**—De Facto Corporation.—A national bank, once chartered and continuing to do business, is a de facto corporation, and, though its charter has expired, its right to sue cannot be questioned.—First Nat. Bank of Kansas City, Mo., v. Pennig, Cal. App., 151 Pac. 1153.

12.——Deposit of Draft,—Where a draft is deposited by the payee in a bank other than that on which it is drawn "for deposit * * * to the credit of" the payees, prima facie the title to the draft and the proceeds thereof is in the payees.—Baldwin State Bank v. National Bank of Athens, Ga., 86 S. E. 538.

13. **Beneficial Associations**—Injunction. — A colored order, known as the Free and Accepted Masons, held not entitled to enjoin a rival order from the use of the name of the Ancient Free & Accepted Masons, Colored.—Free and Accepted Masons of the State of Texas v. Ancient Free and Accepted Masons, Colored, Tex. Civ. App., 179 S. W. 265.

14. **Bills and Notes**—Burden of Proof.—Where fraud or illegality in the execution or procurement of a note is set up as a defense to the suit of an indorsee, the burden is on the indorsee to show his protection from such defense as a bona fide purchaser for value before maturity.—Bright Nat. Bank of Flora v. Hartman, Ind. App., 109 N. E. 846.

15.——Burden of Proof.—Where the maker of a note shows that the note has been negotiated in violation of agreement, the burden is on the holder to prove acquisition of title as a holder in due course, without notice of any infirmity.—Gourley v. Pioneer Loan Co., Okla., 151 Pac. 1072.

16.——Negotiability.—A provision for payment of an attorney fee, in a note given since enactment of the negotiable instrument law, does not render the note nonnegotiable.—City Nat. Bank v. Kelly, Okla., Pac. 1172.

17.——Novation.—Where either of two renewal notes constituted a novation, the note for which the renewals were given was no longer a binding obligation.—First State Bank of

Amarillo v. Coper, Tex. Civ. App., 179 S. W. 295.

18. **Boundaries**—Estoppel.—Two lot owners in the center of a block which contained a surplus of 18 inches held bound by the descriptions in their deeds, and not entitled in an action between them alone to have their corners shifted so as to apportion their share of the surplus.—Elam v. Hickman, Ky., 179 S. W. 17.

19.——Monuments.—In determining the location of boundaries, monuments govern distances.—Stefanick v. Fortune, Mass., 109 N. E. 878.

20. **Cancellation of Instruments**—Alternative Relief.—In an action to cancel a deed for fraud, the court, on refusing to cancel, may enforce payment of a note given for the purchase price of the land deeded.—Van Valkenburgh v. Jantz, Wis., 154 N. W. 373.

21. **Carriers of Goods**—Rates.—A contract between a shipper and a station agent for a different rate than that specified in the tariffs filed with the Interstate Commerce Commission held void.—St. Louis & S. F. R. Co. v. Pickens, Okla., 151 Pac. 1055.

22.——Waiver.—Acceptance by railroad of freight charge less than the rate filed with the Interstate Commerce Commission, by mistake not discovered till after consignee's settlement with his principal, held not to create a waiver or estoppel precluding recovery of the balance from the consignee.—Pennsylvania R. Co. v. Titus, N. Y., 109 N. E. 857, 216 N. Y. 17.

23.——Waiver.—Where a carrier made no objection on the ground that shipper had not properly presented its claim in acordance with bill of lading, but proceeded with negotiations, it waived the right to object to the manner of presentation.—St. Louis, I. M. & S. R. Co. v. Laser Grain Co., Ark., 179 S. W. 189.

24. **Carriers of Passengers**—Alighting Passenger.—The custom of a railroad company to allow persons to enter its trains to assist passengers excuses plaintiff, in jumping from the train after it started, from showing notice to the company of his intent to alight.—Ft. Worth & D. C. Ry. Co. v. Allen, Tex. Civ. App., 179 S. W. 62.

25.——Starting Train.—In the absence of knowledge that one enters its train merely to assist passengers and then alight, the carrier may assume such a person to be a passenger, and may start its train after giving him reasonable time to get aboard.—Ft. Worth & D. C. Ry. Co. v. Allen, Tex. Civ. App., 179 S. W. 62.

26. **Chattel Mortgages**—Conditional Sales.—The vendee of property in possession under a conditional contract of sale has a property interest which can be mortgaged.—Federal Trust Co. v. Bristol County St. Ry. Co., Mass., 109 N. E. 880.

27. **Common Carriers**—Regulation.—One engaging in business of a carrier, and obtaining a license to use public streets of a city therefor, holds his property and rights subject to other and different burdens the Legislature may reasonably impose.—Nolen v. Riechman, U. S. D. C., 225 Fed. 812.

28. **Conspiracy**—Damages.—Damages to a general creditor from defendants' fraudulently conspiring with the debtor to accept and foreclose a chattel mortgage to hinder the creditor held too remote, indefinite, and contingent to be the basis of an action.—Security State Bank of Enid v. Reger, Okla., 151 Pac. 1170.

29. **Constitutional Law**—Special Immunities.—Pen. Code 1913, §§ 717-720, fixing the hours of work for women and prescribing different standards for railroad eating houses than other businesses, held not to grant special immunities in violation of Const. art. 2, § 13.—State v. Dominion Hotel, Ariz., 151 Pac. 958.

30. **Contracts**—Breach.—On an anticipatory breach of contract, the other party is excused from further performance, and may treat the contract as terminated and immediately maintain an action for damages.—Indiana Life Endowment Co. v. Carnithan, Ind. App., 109 N. E. 851.

31.——Entirety.—A contract is entire where it contemplates that all its parts and the consideration shall be common each to the other and interdependent.—Dunn v. T. J. Cannon Co., Okla., 151 Pac. 1167.

32.——Mutuality.—A contract of sale whereby the seller was not to sell to other purchasers, and the buyer was to buy all his goods from the seller, held mutual.—Western Macaroni Mfg. Co. v. Fiore, Utah, 151 Pac. 984.

33.——Public Policy.—In an action by a lawyer to recover his share of a fee collected by his associates in a case, held, that it was no defense that the contract under which the fee was collected was contrary to puolic policy and void.—Martindale v. Shaha, Okla., 151 Pac. 1019.

34.——Restraint of Trade.—Agreement by defendant upon sale of his fish business not to engage in similar business for ten years within 100 miles held not void as an unreasonable restraint of trade.—Morehead City Sea Food Co. v. Way, N. C., 86 S. E. 603.

35. **Corporations**—Declaration of Dividend.—Where directors declare a dividend, or where the company has earned profits and the directors wrongfully refuse to declare a dividend, a preferred stockholder occupies the position of a corporate creditor to the extent of the accumulated profits due him.—Smith v. Southern Foundry Co., Ky., 179 S. W. 205.

36.——Foreign Corporation.—It is within the power of the Legislature to impose conditions upon foreign corporations entering the state, and hence Stock Corporation Law, § 70, giving a remedy to such foreign corporations for wrongful distribution of dividends, is a proper exercise of legislative power.—German-American Coffee Co. v. Diehl, N. Y., 109 N. E. 875, 216 N. Y. 57.

37.——Remedies.—So far as not penal, courts of Tennessee will enforce laws of another state creating a liability on the party of a single stockholder for the unpaid balance of his stock, although Tennessee laws require that all holders of unpaid stock shall be made parties.—Sullivan v. Farnsworth, Tenn., 179 S. W. 317.

38.——Stockholders Liability.—Additional liability of stockholders of a corporation created by the Constitution and laws of Ohio becomes a primary one and enforceable on insolvency of the corporation and an assessment against stockholders.—Irvine v. Baker, U. S. D. C., 225 Fed. 834.

39. **Courts**—Transitory Actions.—Where defendant's cattle entered upon plaintiff's land and ate plaintiff's wheat, which was in stacks, an action for damages wherein no damages for injuries to the realty were claimed is transitory.—Allen v. Allen, Utah, 151 Pac. 982.

40.——Venue of Suit.—A statute authorizing persons who have furnished the holder of a government construction contract with labor and materials to sue in the district where the contract was performed does not require the United States to sue on a contractor's bond for the cost of completing an abandoned contract only in such district.—United States v. Marshall, U. S. C. C. A., 225 Fed. 760.

41. **Criminal Law**—Dying Declaration.—Declarations of deceased made under circumstances raising a reasonable presumption that they were his spontaneous utterances and were not the result of premeditation held admissible as part of the res gestae.—Morehead v. State, Okla. Cr. App., 151 Pac. 1183.

42.——Res Gestae.—A statement by one jointly indicted with defendant tending to show defendant's participation in the crime held not admissible as part of the res gestae.—Gibbs v. State, Ga., 86 S. E. 543.

43.——Silence.—Statement made by one to another jointly accused with him of murder, charging him with firing the shot, held competent against person so accused, where the circumstances were such that he would naturally have denied the charge, if false.—Wilson v. Commonwealth, Ky., 179 S. W. 237.

44. **Customs Duties**—Importation of Goods.—Importation of films of prize fight for exhibition

before clubs, societies, associations, and their guests, held prohibited by Act July 31, 1912.—Kalisthenic Exhibition Co. v. Emmons, U. S. D. C., 225 Fed. 902.

45. **Damages**—Mitigation.—An injured person who knows of a way to minimize his damages for alleged negligence by his physician and fails to employ it, cannot recover from the physician for continued pain and suffering caused by such failure.—Dahl v. Wagner, Wash., 151 Pac. 1079.

46. **Death**—Presumption of Survivorship.—Where a husband and wife, making mutual wills, were frozen to death in the same snowstorm, with no evidence as to which died first there was no presumption as to survivorship or simultaneous death.—Fitzgerald v. Ayres, Tex. Civ. App., 179 S. W. 289.

47. **Deeds**—Conditions.—Where a deed retained a lien and declared it did not become absolute until full performance by vendee, the vendor held entitled to possession under unimpaired title, where the vendees repudiated the conditions.—Imperial Sugar Co. v. Cabell, Tex. Civ. App., 179 S. W. 83.

48. **Eminent Domain**—Injunction.—Where an illegal effort is made to exercise the power of eminent domain, the landowner may apply for an injunction.—Harrold v. Central of Georgia Ry. Co., Ga., 86 S. E. 552.

49.——Surface Waters.—Where a railroad condemns land for its right of way, it need make no compensation to abutting owners for surface waters which will be discharged from its bed upon their property.—Harvie v. Town of Caledonia, Wis., 154 N. W. 383.

50. **Equity**—Multifariousness.—Where complainants have a common interest in the litigation and some relation to each other arising therefrom, and the allegations are of a distinct equity as to which specific relief is prayed against some defendants, the complaint is not multifarious.—Richardson v. Gaither, Fla., 69 So. 699.

51. **Estoppel**—By Conduct.—Husband, though in plaintiff's store when wife purchased alleged necessaries, held not estopped from defeating liability, if he did not know the goods were being charged to him.—Trammell v. Neiman-Marcus Co., Tex. Civ. App., 179 S. W. 271.

52.——By Conduct.—Insured, who, after the insurer's alleged repudiation of the contract elected to treat it as in force for the recovery of benefits thereby kept it alive for all purposes, both for himself and for the insurer, and estopped himself from afterwards predicating a suit thereon for damages.—Indiana Life Endowment Co. v. Carnithan, Ind. App., 109 N. E. 851.

53.——Election of Remedy.—Where individuals, in effect, agree that their controversy concerning the rights of one to build a dike to protect his land from surface water came within certain statutes, such individuals are bound by their election.—Harvie v. Town of Caledonia, Wis., 154 N. W. 383.

54.——Holding Out.—Where a wife vests her husband with title and possession of personal property, and permits him to hold himself out as owner, thus obtaining credit, she is estopped from thereafter questioning his ownership.—Rioux v. Cronin, Mass., 109 N. E. 898.

55. **Evidence**—Hearsay.—Except in cases of pedigree, relationship, marriage, death, age, and boundaries, hearsay evidence is inadmissible.—Pulkrabeck v. Griffith & Griffith, Tex. Civ. App., 179 S. W. 282.

56.——Judicial Notice.—The court may take judicial notice, as of a matter of common knowledge, that a sand pile was an attractive nuisance to children two or three years of age.—Gnau v. Ackerman, Ky., 179 S. W. 217.

57.—Presumption.—Where a fraudulent conveyance was averred, the failure of the defendant wife, who was grantee, to take the stand, and of the daughter, who it was alleged had knowledge of the facts, warrants an inference against the good faith of the transaction.—Rioux v. Cronin, Mass., 109 N. E. 898.

58.——Judicial Notice.—The court will not take judicial notice that an employe engaged in handling molten type from a linotype machine may, in the course of his employment, contract lead poisoning.—In re Doherty, Mass., 109 N. E. 887.

59. **Exchange of Property**—Rescission.—Plaintiff who informed defendant he knew nothing of soils, and was falsely told that defendant's land was not white and would not require drainage, and thereupon exchanged his own for it, could rescind the contract.—Held v. Kennedy, Ore., 151 Pac. 968.

60. **Food**—Negligence.—The duty of one who prepares and markets in bottles or sealed packages foods, drugs, or beverages to exercise ordinary care that nothing unwholesome or injurious is contained therein is based upon negligence.—Crigger v. Coca-Cola Bottling Co., Tenn., 179 S. W. 155.

61. **Guaranty**—Discharge of Guarantor.—The extension of time for payment of a note which, when extended by the holder to the maker, will discharge a guarantor, must be based on a valid contract, founded on consideration, and for a definite time.—Marshall v. Hollingsworth, Ky., 179 S. W. 34.

62. **Homestead**—Dower.—Where a husband dies intestate leaving a son, the widow is entitled to the use of the proceeds of the homestead less her dower interest therein if she elects to receive that presently, during widowhood, and upon her remarriage or death the fund becomes the property of the son.—In re Sydow, Wis., 154 N. W. 371.

63. **Homicide**—Dying Declarations.—Dying declarations, to be admissible, must be made by a person in the article of death, who is conscious of his condition, and must relate to the cause of his death and the person who killed him.—Howard v. State, Ga., 86 S. E. 540.

64.——Dying Declarations.—To render dying declarations admissible, it is not essential that the declarant state that he is expecting immediate death, but is enough if it satisfactorily appears that such was the condition of his mind.—Morehead v. State, Okla. Cr. App., 151 Pac. 1183.

65.——Evidence.—In a trial for murder, contents of letter of deceased in reply to defendant's wife held inadmissible, but that deceased received a letter from her and the registry receipt for it to which his answer was in reply was admissible.—Vollintine v. State, Tex. Civ. App., 179 S. W. 108.

66.—Manslaughter.—Defendant, who had reason to believe that his wife had committed adultery with deceased, and that deceased was then endeavoring to have such relations renewed, and whose mind was rendered incapable of cool reflection, would be guilty only of manslaughter.—Mitchell v. State, Tex. Civ. App., 179 S. W. 116.

67.——Murder.—No appreciable length of time is required to exist for deliberation and premeditation in forming the intent to kill which will render a homicide murder.—Faltin v. State, Ariz., 151 Pac. 952.

68.——Premeditation.—One who kills another through mistaken identity, while attempting with premeditated design to kill another, is guilty of murder in the first degree.—Hall v. State, Fla., 69 So. 692.

69. **Husband and Wife**—Loss of Services.—Notwithstanding the Married Women's Act, a husband may, as at common law, recover for loss of the services of his wife by reason of her personal injuries.—City of Chattanooga v. Carter, Tenn., 179 S. W. 127.

70.——Separate Maintenance.—In wife's action for separate maintenance, the court could grant her application for alimony pendente lite and suit money, although the husband set up an agreement releasing him from his obligation to support.—Robinson v. Robinson, Wash., 151 Pac. 1128.

71. **Indians**—Allotments.—A valid agricultural lease of a restricted Creek allotment may be made during the existenec of a prior valid lease, if for a fair rental, near the termination

of the existent lease, and not extending more than five years.—Hudson v. Hildt, Okla., 151 Pac. 1063.

72. **Injunction**—Multiplicity of Suits.—Equity cannot enjoin criminal proceedings under a statute, though it be charged that the act is invalid and that a multiplicity of actions will result in irreparable damage, when complainant's defense at law is adequate.—Alexander v. Elkins, Tenn., 179 S. W. 310.

73.——Trespass.—In proper cases, where the other necessary elements of equitable jurisdiction are present, injunction will lie to restrain an owner from willfully and knowingly turning his stock upon the uninclosed premises of a private owner.—Hill v. Winkler, N. M., 151 Pac. 1014.

74.——Violation of.—Where a court having jurisdiction of the person and subject-matter grants an injunction, the person enjoined cannot, in view of the Civ. Code 1910, § 5501, justify a violation of the injunction on the ground that it was erroneously granted.—Dunn v. Harris, Ga., 86 S. E. 556.

75. **Insurance**—Misrepresentation.—To avoid a policy for misrepresentation, the false statement must have been made willfully and with the intent to deceive, and relied upon by the insurer; and a misrepresentation made innocently and in the belief of its truth will not avoid the policy.—American Nat. Ins. Co. v. Anderson, Tex. Civ. App., 179 S. W. 66.

76.——Presumption of Death.—In an action on a life policy, brought on the theory that insured's death was shown by his unexplained absence for seven years, the case was for the jury under the evidence.—New York Life Ins. Co. v. Holck, Colo., 151 Pac. 916.

77. **Judgment**—Newly-Discovered Evidence.—Enforcement of a judgment in favor of the assignee of a note will not be enjoined, several years after rendition, on account of newly-discovered evidence as to fraud affecting only the original transaction.—Hudgens v. Baugh, U. S. D. C., 225 Fed. 899.

78. **Landlord and Tenant**—Repair of Premises.—Where a freight elevator in a building is with the landlord's consent used for passenger purposes by the several tenants, held, that it must be kept in the same safe condition as it was at the beginning of the term.—Mikkanen v. Safety Fund Nat. Bank, Mass., 109 N. E. 889.

79.——Res Ipsa Loquitur.—Where an iron post, which was substituted for part of a brick chimney, slipped and allowed bricks from above to fall on a customer of the lessee, the doctrine of res ipsa loquitur will apply in an action against the lessor.—Feeley v. Doyle, Mass., 109 N. E. 902.

80. **Libel and Slander**—Good Character.—In an action for slander, plaintiff may show, in aggravation of damages, that he is of good character and reputation, though justification is not pleaded.—Deitchman v. Bowles, Ky., 179 S. W. 249.

81. **Licenses**—Burden of Proof.—Where a penal statute fixes conditions precedent to the right to carry on a business, the party seeking to enforce a right dependent upon it has the burden of showing compliance with the statute.—Bright Natl. Bank of Flora v. Hartman, Ind. App., 109 N. E. 846.

82. **Malicious Prosecution**—Advice of Counsel.—Advice of counsel, where there is a complete disclosure to the attorney, is a defense to an action of malicious prosecution.—Carrigan v. Graham, Ky., 179 S. W. 198.

83. **Master and Servant**—Hours of Labor.—Legislation restricting the number of hours of labor which may be performed in one day, when detrimental to the health of laborers or a particular class of employes, as women, is a valid exercise of the police power.—State v. Dominion Hotel, Ariz., 151 Pac. 958.

84.——Proximate Cause.—Railway company is not negligent in placing signal torpedo on track, and hence is not liable, when so doing, for failing to use ordinary care in providing reasonably safe place to work.—Gordon v. Chesapeake & O. Ry. Co., Ky., 179 S. W. 210.

85.——Respondeat Superior.—Plaintiff employed by defendant as a car repairer while walking upon its track under foreman's order to repair the house of a son of defendant's superintendent held not within scope of his employment, and a trespasser.—Cumberland R. Co. v. Walton, Ky., 179 S. W. 245.

86.——Statutory Duty.—A master's violation of the terms of a statute requiring structures to secure safety in mine shafts was negligence per se, and made him responsible for all injury suffered as a direct consequence thereof.—American Zinc Co. v. Graham, Tenn., 179 S. W. 138.

87.——Workmen's Compensation Act.—Bruising of servant's hand between pieces of wood, breaking the skin, held the proximate cause of blood poisoning, and an accident in the cause of his employment, within the Workmen's Compensation Act.—Great Western Power Co. v. Pillsbury, Cal., 151 Pac. 1136.

88. **Mechanics' Liens** — Construction. — Mechanics' liens, though unknown to the common law, are to be liberally construed, to protect workmen, contractors, and materialmen.—Mellon v. St. Louis Union Trust Co., U. S. C. C. A., 225 Fed. 693.

89. **Mortgages**—Acceptance.—Where a mortgagor agreed to take a new mortgage which should not be effective until the interest on the first mortgage had been paid or settled, a recordation by the mortgagee of the new mortgage without payment of interest constituted an acceptance thereof.—Gray v. Gilliam, Ky., 179 S. W. 22.

90. **Municipal Corporations**—Estoppel.—After a sidewalk has been completed and accepted by the city council, abutting owners held estopped, on collateral attack in a proceeding to restrain the collection of taxes, to assert that the work was not done in accordance with the contract.—Stott v. Salt Lake City, Utah, 151 Pac. 988.

91.——Issuance of Bonds.—Where the credit of a city or county is to be used for a proper city or corporation purpose, bonds may be issued, if due authority is given by the Legislature, without a submission of the matter to a vote of the people.—Imboden v. City of Bristol, Tenn., 179 S. W. 147.

92. **Officers**—Negligence.—Judicial and administrative officers engaged in official acts involving the exercise of discretion are not liable for injuries sustained by individuals through negligence in failing to perform, or in the performance of, their duties, in the absence of corrupt or malicious action.—Hipp v. Farrell, N. C., 86 S. E. 570.

93. **Parent and Child**—Torts of Child.—A father is not responsible for the torts of his minor child merely by virtue of the parental relation.—Winn v. Haliday, Miss., 69 So. 685.

94. **Payment**—Duress.—"Duress," as a ground for the recovery of money paid, is a relative rather than a positive term, depending on the situation of the parties and all the surrounding circumstances, and must be such as to so strongly influence the payor that his payment is not the act of his own will.—Coon v. Metzler, Wis., 154 N. W. 377.

95. **Perjury**—Evidence.—Under Laws 1913, c. 224, § 2, a person swearing falsely in an affidavit, that the persons for whom a marriage certificate is asked are of lawful age, may be convicted, though affiant did not know that his statement was untrue.—State v. Rupp, Kan., 151 Pac. 1111.

96. **Perpetuities**—Restraint of Alienation.—Condition of deed that grantee should not sell or convey to any one except grantor's heirs held void as an unreasonable restraint of alienation.—Chappell v. Frick Co., Ky., 179 S. W. 203.

97. **Physicians and Surgeons**—Negligence.—The fact that there are more modern or more favorable methods which might have been used in treating an injured man does not show negligence on the part of the physician, if there is at least a "respectable minority' in favor of the treatment given.—Dahl v. Wagner, Wash., 151 Pac. 1079.

98. **Principal and Surety**—Conditional Signing.—Two signers of a note as principals had the right to sign and deposit it with the payee on condition that it should not become valid until other principals had signed it.—First State Bank of Amarillo v. Cooper, Tex. Civ. App., 179 S. W. 295.

99.——Revocation.—Powers are irrevocable by the principal when they form part of an act deemed valuable in law, or which forms part of the contract and is a security for money or for the performance of any act deemed valuable.—Quanah, A. & P. Ry. Co. v. Dickey, Tex. Civ. App., 179 S. W. 69.

100.——Undisclosed Principal.—That a commission company, who had the exclusive sale of butter shipped by a creamery company, sold all the butter at cost to its employe, did not make him an undisclosed principal, as to the creamery company, which had no knowledge of the transaction.—Beatrice Creamery Co. v. Garner, Ark., 179 S. W. 160.

101.——Undisclosed Principal.—While an undisclosed principal cannot be held liable for a contract in the agent's name in case of a specialty, he may be held in the case of an ordinary executory contract for the conveyance of land.—First Nat. Bank of Kennewick v. Conway, Wash., 151 Pac. 1129.

102. **Railroads**—Contracts.—A railroad company has incidental power to contract with its employes to pay them half wages during disability resulting from service accidents.—McAdow v. Kansas City Western Ry. Co. Kan., 151 Pac. 1113.

103.——Crossings.—One who goes upon a railway track between two crossings, in disregard of warnings, and fails to observe the approach of a train which, had he looked, he must have seen, is negligent, and for his death the company is not liable.—Edwards v. New York Cent. & H. R. R. Co., N. Y. Sup., 155 N. Y. S. 176.

104.——Receivership.—An order appointing the receivers of a railroad company to be receivers in a foreclosure suit under a mortgage given by such company does not vacate the original appointment of the receivers.—Pennsylvania Steel Co. v. New York City Ry. Co., U. S. C. C. A., 225 Fed. 734.

105. **Reformation of Instruments**—Burden of Proof.—One seeking reformation of contract for exchange of lands must show that it did not locate the lands as claimed by him through fraud, accident, or mutual mistake of the parties.—Stromberg v. Alexander, Iowa, 154 N. W. 414.

106. **Sales**—Bill of Lading.—Where the seller forwards a draft with the bill of lading attached, for the amount of the cotton sold, held, that the buyer does not acquire legal title until he has accepted and paid the draft.—Delgado Mills v. Georgia R. & Banking Co., 86 S. E. 550.

107.——Implied Warranty.—Defendant, under contract to install in plaintiff's pianos a specific patented type of pneumatic player action, did not breach such contract; there being no implied warranty of fitness for purpose intended.—American Player Piano Co. v. American Pneumatic Action Co., Iowa, 154 N. W. 389.

108. **Specific Performance**—Evidence. — The agreement itself and part performance thereof must be shown to justify enforcement of parol agreement by grantee to convey to persons designated by the grantor.—Woolley v. Stewart, N. Y. Supp., 155 N. Y. S. 169.

109.——Waiver.—In a suit for specific performance, issue as to whether a tract of land had been omitted from the description in the defendant's deed by mistake held waived by the admissions of the answer.—Bryan v. Canady, N. C., 86 S. E. 584.

110. **States**—Intoxicating Liquors.—Congress has power to require a territory to insert in its Constitution as condition of admission to statehood, a provision prohibiting the sale or manufacture of intoxicating liquors in Indian territory, and their introduction from other parts of the state.—Leisy Brewing Co. v. Atchison, T. & S. F. Ry. Co., U. S. C. C. A., 225 Fed. 753.

111. **Subrogation**—Parties.—One who conveys with warranty land which he has himself mortgaged, and who subsequently pays the mortgage to protect his reserved life estate, held not entitled to be subrogated to the mortgage lien.—Van Valkenburgh v. Jantz, Wis., 154 N. W. 373.

112.——Privity.—Where a prinicpal was indebted to an agent, sureties of the agent who had been compelled to pay his debt cannot be substituted to the agent's rights against the principal; there being no privity.—Hodge Tobacco Co. v. Sexton, Ky., 179 S. W. 36.

113. **Subscriptions**—Indemnity Contract. — A subscription contract in aid of railway construction, providing for a bond to pay damages to abutting owners if relinquishments were not obtained, held an indemnity contract upon which the subscriber is jointly and severally liable primarily for the amount of his subscription, enforceable although not reduced to judgment.—Quanah, A. & P. Ry. Co. v. Dickey, Tex. Civ. App., 179 S. W. 69

114. **Sunday**—Discrimination. — Permission granted by ordinance to drug stores to sell certain commodities on Sunday between certain hours, to the exclusion of other stores, held not unreasonable discrimination.—State v. Medlin, N. C., 86 S. E. 597.

115. **Taxation**—Corporate Shares.—The state of Vermont has the power to tax all the shares of corporations organized under its laws, whether owned by its residents or those of other states or countries.—Bellows Falls Power Co. v. Commonwealth, Mass., 109 N. E. 891.

116.——Deposits.—Where money was deposited in a bank pending suit, pursuant to order of court, assessment thereof was not vitiated because assessed to the bank as receiver.—Spring Valley Water Co. v. City and County of San Francisco, U. S. C. C. A., 225 Fed. 728.

117. **Telegraphs and Telephones**—Mental Anguish.—The Louisiana law is that, in an action against a telegraph company for negligent delay in delivering a dispatch, mental anguish may constitute an element of damages.—Western Union Tel. Co. v. Robertson, Miss., 69 S. 680.

118. **Trade Unions**—Treasurer.—Act of treasurer of labor union in changing form of deposit by drawing checks to pay for time certificates of deposit was not a disbursement for which he was entitled to credit on his accounting to his successor in office.—Tinkler v. Powell, Wyo., 151 Pac. 1097.

119. **Trusts**—Cestuis que Trust.—An unwarranted surrender of the trust estate by the trustee in, consenting to the vacation of a judgment in favor of the beneficiaries and to entry of a judgment against him held not binding upon the cestuis que trust.—Belcher v. Cobb N. C. 86 S. E. 600.

120.——Constructive Trust.—To establish a parol constructive trust, the proof must be such as to leave no rational doubt as to the truth of the necessary facts; and, to establish such trust against documents showing the legal title to be in someone else, the evidence must be strong and convincing.—Holtzclow v. Wills, Ky., 179 S. W., 193.

121. **Vendor and Purchaser**—Covenant.—The words "grant" and "demise," if unrestrained, impose on the lessor a covenant that he has good title and a right to lease.—Ford v. Ball, W. Va., 86 S. E. 562.

122.——Deed of Trust.—Where vendee executed a note secured by deed of trust to indemnity indorsers upon a purchase-money note for the property, such lien was not destroyed by a sale subsequently made by him in consideration of the vendee's assumption of the original vendor's lien notes.—Grubbs v. Eddleman, Tex. Civ. App., 179 S. W. 91.

123.——Marketable Title.—A purchaser of land, before he is required to pay the purchase price, is entitled, unless stipulated to the contrary, to receive not only a good title, but one which is marketable.—Mays v. Blair, Ark., 179 S. W. 331.